IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 582 OF 1984

Prakash Shankar Desai ... Appellant

V/s

Yashwant Arjun Kate & ors. ... Respondents

Mr. A.Y. Sakhare with M.V. Bandivadekar for the appellant.

Mr. V.S. Gokhale for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 14TH OCT., 2005

ORAL JUDGMENT:

1. This appeal is preferred by the appellant defendant against the judgment and order passed by the Assistant Judge, Kolhapur, dated 31.8.1981 whereby two appeals involved were partly allowed by setting aside the decree passed by the lower Court and it was declared that the suit property was of the ownership of the plaintiffs and the heirs of Ishwara i.e. degfendant Nos. 2(1) to 2(6). The suit of the plaintiff, however, in respect of injunction came to be dismissed.

2. The Trial Court had dismissed the plaintiffs' suit

for injunction by order dated 3.10.1978 against which the lower appellate Court had entertained two cross-appeals and passed the order accordingly as noted above.

3. I have heard the learned counsel for both parties. Perused the record including the additional evidence brought on record by virtue of Civil Application No. 7797 of 1999.

4. The suit property involved is the property bearing C.T.S. No. 2018/Kh/7 admeasuring 40 ft. x 78 ft. at E-Ward, Rajarampuri, Kolhapur. The plaintiffs filed the suit for injunction against the defendants and for declaration that they are the owners of the suit property with which the defendants had no concern whatsoever. It was the case of the plaintiffs that their father Arjuna Ranoji Kate (who died on 14.7.1943) had four sons, namely, plaintiff Nos.1 & 2, defendant No.2 Ishwara and another son by name Dinkar. Said Dinkar had separated from Hindu joint family during life time of father. The joint family was having ancestral lands at Kolhapur. These lands were acquired by the then ruler of Kolhapur State for extension of locality of Rajarampuri and in exchange of these acquired lands,

Arjuna was given three plots bearing Nos. 322, 323 and 324 alongwith some amount in cash.

The daughter of one Shankarrao Desai was given to defendant No.2 in marriage. Defendant No.1 Prakash is the son of said Shri Desai who died on 11.5.1961. Neither Shankarrao nor his son defendant No.1 were ever in possession of suit property or having concern with suit property Plot No.322. However, on 22.5.1970, the defendant No.1, at the instance of defendant No.2, applied to City Survey Office, Kolhapur to enter his name to the suit plot. Defendant No.1 claimed that by a will dated 14.7.1943, the suit plot was bequeathed by Arjuna to father of defendant No.1 Shankarrao. Plaintiffs, therefore, contended that the said will is bogus and no right, title or interest is created on that basis either in favour of Shankarrao or in favour of his son defendant No.1. Defendant Nos. 1 and 2 are obstructing possession of plaintiffs over the suit property and, therefore, they should be restrained by an order of permanent injunction. The said suit was filed on 10.3.1972.

5. Defendant No.1 filed the written statement contending that the suit plot was given to his father by

Arjuna under the will. Hence, after the death of Arjuna, father of defendant No.1 came into possession and similarly after the death of his father, the possession continued with defendant No.1. Even today he is in possession of the suit plot. The suit plot was separate property of Arjuna Kate and did not belong to joint family, nor the same was given in exchange of the lands of the family said to be acquired by the Kolhapur State as alleged in the plaint. In fact, the suit property was given to Arjuna by Kolhapur State in his personal capacity. The family had already separated during the life time of Arjuna inasmuch as, one son Dinkar had separated. Out of the three plots received by Arjuna from the Kolhapur State and that too on payment of Nazrana, he has given block No.323 to the plaintiffs and Block No.324 to the defendant No.2. Hence, the third plot i.e. 322 was bequeathed by him in favour of defendant No.1 by will dated 12.7.1943. The plaintiffs and Ishwara were knowing that the suit plot was given to Shankarrao under the will but still they have never objected to the same nor obstructed his possession. In fact, in an agreement between the plaintiffs and defendant No.2, the parties had admitted that Plot No.322 had been given to Shankarrao by their father Arjuna Kate and that plot should remain with

Shankarrao. On these pleadings, defendant No.1 prayed for dismissal of the suit.

Defendant No.2 Ishwara Kate came with the case fully supporting the defendant No.1 and opposed the suit on merits. He denied that the suit property ever belonged to Hindu joint family and contended that the said plot with other two plots were obtained by Arjuna Kate by paying Nazrana to the Kolhapur Chhatrapati and, as such, the same was separate property of Arjuna Kate. Hence, he was fully entitled to bequeath the same which he had done under the will in favour of Shankarrao. After the death of Arjuna Kate, on the basis of the will, Shankarrao came into possession of the suit plot and after his death, the possession went to defendant No.1 and, therefore, the defendant No.2 also prayed for dismissal of the suit.

Defendant Nos. 2(1) to 2(6) came in picture when defendant No.2 died and his heirs defendant Nos. 2(1) to 2(6) were brought on record. They supported the case of the plaintiffs. It may be noted that, since the said defendants were brought on record as legal heirs and representatives of defendant No.2, they are not entitled

to take up the stand contrary to the stand which was taken up by their predecessor in title.

6. The learned Trial Judge, adjudicated the dispute on merits on the basis of available evidence and was of the view that the suit deserves to be dismissed and hence order to that effect was passed. The Trial Court held that the will was legally and validly executed by Arjuna Kate pursuant to which Shankarrao became owner of the suit plot. The possession of the suit plot was with Shankarrao and after his death, the same came to defendant No.1. Plaintiffs were never in possession of the suit plot. The Trial Court further held that the suit property was self acquired property of Arjuna Kate and, therefore, he was entitled to bequeath the same and accordingly it was proved that the suit property was given to Shankarrao Desai by Arjuna Kate under the will. The Trial Court further held that it has not been proved that the three plots including the suit plot were obtained by Arjuna from the Kolhapur Chhatrapati in exchange of ancestral property belonging to Hindu joint family.

Being aggrieved by the said judgment of the Trial Court, the original plaintiffs filed R.C.A. No. 5 of 1979.

Similarly, defendant Nos. 2(2) to 2(6) filed R.C.A. No. 6 of 1979. Both appeals were heard together by the lower appellate Court and were adjudicated in aforesaid manner. The decree of the Trial Court was set aside and instead it was declared that the suit property is of the ownership of the plaintiffs and the heirs of Ishwara i.e. defendant Nos. 2(1) to 2(6). However, the learned appellate Court was pleased to dismiss the suit of the plaintiffs with respect to the relief of injunction. It is against the aforesaid decree passed by the lower appellate Court the present appeal has been filed.

7. This Court, while adjudicating the matter, framed substantial question of law as follows :-

> "Whether the property was ancestral property or not is arguable."

At the outset, it may be noted that both the Courts below have concurrently held that the defendant No.1 has proved the execution of the will dated 14.7.1993 by Arjuna Kate in favour of Shankarrao Desai. The plaintiffs have not filed any second appeal or cross-objection in this Court to challenge the said

finding and, as such, that finding has attained the finality.

8. Both the lower Courts have concurrently held that, after the death of Arjuna Kate, Shankarrao Desai came in possession of the suit plot and after his death, it is the appellant defendant No.1 who is in possession of the suit plot. Therefore, both the Courts below have refused decree of injunction as prayed for by the plaintiffs. The plaintiffs have not filed any second appeal or cross-objection in this Court as noted earlier and, therefore, the said finding regarding the possession of defendant No.1 has attained finality.

The Trial Court, in its judgement, has referred to document at Exh.66 which is an agreement between the plaintiffs and defendant No.2 Ishwara. In the said agreement, parties had admitted that one plot admeasuring 40 ft. x 78 ft. out of property C.T.S.No. 2018-Kh/7 has been given by their father to Shankarrao Gopalrao Desai and the same is in his possession and they do not have any concern over the same. On the basis of these admissions, the Trial Court has held that Shankarrao Desai was put in possession after the death of Arjuna and the plaintiffs were fully aware of the

said fact. However, the lower appellate Court has totally lost sight of the said important document as well as the finding recorded by the Trial Court on the basis of that document. It is pertinent to note that while reproducing the submissions made on behalf of the respondent No.1 in that appeal, the Court has noted the contentions regarding the said agreement. However, apart from this, there is no further discussion nor any finding recorded by the lower appellate Court in relation to the said document. The lower appellate Court in its judgment has made reference to certain statements reproduced in vernacular language and on that basis, it is concluded that the defendant No.2 had admitted that the plot in question was received by Arjuna Kate in exchange of the lands of joint family acquired by Kolhapur State. However, the Court has not properly interpreted the said statement. In fact, in this second appeal, the appellant has filed Civil Application No. 7797 of 1997 for production of additional evidence. Hence the Court passed order on 21.2.2003 and directed that the said civil application shall be heard alongwith the said appeal. The respondents plaintiffs did not file any affidavit in reply to oppose the said civil application nor it was even referred to in the course of the argument by the

learned counsel for the respondents in this regard and, as such, the production of the said additional evidence is deemed to be granted and documents annexed to the said civil application are required to be read in evidence while deciding the second appeal, especially when the conditions contemplated under Order 41 Rule 27 of the C.P.C. are fulfilled by the appellant.

9. From these three documents which are annexed as additional evidence to the civil application, it is evident that there is no reference whatsoever to show that the three plots given to Arjuna Kate were given in exchange of the lands belonging to joint family as alleged by the plaintiffs. On the contrary, it can be seen that the said plots were given to Arjuna Kate on payment of Nazrana to the ruler of Kolhapur State. Therefore, the finding of the lower appellate Court that the plots were given to Arjuna Kate in exchange of the joint family lands acquired by the State is not acceptable and also is contrary to the evidence on record.

10. It was the case of the plaintiffs that the plots in question were allotted to Arjuna in exchange of the lands of family which came to be acquired and,

therefore, the plots were joint family property. Therefore, Arjuna had no legal right to bequeath one of the plots to Shankarrao Desai under the will dated 14.7.1943. But, it is pertinent to note that except the said bare words, there is not an iota of evidence either oral or documentary on behalf of the plaintiffs to prove the said contention. The plaintiffs have not been able to establish that the said finding of the Trial Court is illegal and perverse, by producing any evidence to show to the contrary. Therefore, the lower appellate Court appears to have totally ignored the said finding of the Trial Court.

11. The lower appellate Court has further made reference to the statement made by Ishwara before the City Survey Officer on 29.5.1951 (Exh.68/1). The lower appellate Court has interpreted the said statement to mean that therein Ishwara admitted that the three plots were received by him in exchange of the lands of the family. However, in this respect, the appellate Court failed to take into consideration the application made by Ishwara in which there is not even a whisper about the plots being received in exchange of the lands of the family acquired by the Kolhapur State. Similarly, the Court also failed to consider the conduct of the

plaintiffs, inasmuch as, the plaintiffs never objected to the possession of Shankarrao in the suit plot during his life time and also the possession of defendant No.1 Prakash after the death of Shankarrao. If at all Shankarrao or Prakash had no concern with the suit plot, then it was necessary for the plaintiffs to explain as to why they never raised objection nor took any legal action against Shankarrao or Prakash. Therefore, I have no hesitation to hold that the findings recorded by the lower appellate Court to that extent are illegal and contrary to the evidence on record. The said findings appear to be illegal and, therefore, required interference by this Court.

12. In view of this position, the second appeal is hereby allowed and decree passed by the lower appellate Court is quashed and the order passed by the Trial Court is restored.

In view of the facts and circumstances, there shall be no order as to costs.

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